

ethylene/C₄-C₁₀ olefins and (d) 5-45% filler. See Pellegatti, page 2, lines 33-45. Pellegatti does not teach the flexural modulus limitation. Buehler teaches in analogous art a thermoplastic olefin with a flexural modulus of less than 700 Mpa. See Buehler, Example 3. In view of Buehler, one having an ordinary skill in the art would be motivated to modify Pellegatti by using masterbatch composition with a flexural modulus of less than 700 Mpa. Such modification would be obvious because one would expect that the use of masterbatch compositions as taught by Pellegatti would be similarly useful and applicable to the polymers taught in Buehler.

RESPONSE

Applicant respectfully traverses the rejection of claims 1-13. In particular, claims 1-13 were previously cancelled in Applicant's response of June 23, 2006, and new claims 14-26 were added.

Notwithstanding, the U.S. Supreme Court in *Graham v. John Deere Co.*, 148 U.S.P.Q. 459 (1966) held that non-obviousness was determined under § 103 by (1) determining the scope and content of the prior art; (2) ascertaining the differences between the prior art and the claims at issue; (3) resolving the level of ordinary skill in the art; and, (4) inquiring as to any objective evidence of non-obviousness.

To establish a *prima facie* case of obviousness, the Examiner must establish: (1) that some suggestion or motivation to modify the references exists; (2) a reasonable expectation of success; and (3) that the prior art references teach or suggest all the claim limitations. Amgen, Inc. v. Chugai Pharm. Co., 18 USPQ2d 1016, 1023 (Fed. Cir. 1991); In re Fine, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988); In re Wilson, 165 USPQ 494, 496 (C.C.P.A. 1970).

Further, the Examiner needs to show basis for combining the references to properly set forth a *prima facie* case of obviousness. The combination of the references taught every element of the claimed invention, however without a motivation to combine, a rejection based on a *prima facie* case of obvious was held improper; In re Rouffet, 149 F.3d 1350, 1357, 47 USPQ2d 1453, 1457-58 (Fed. Cir. 1998). The level of skill in the art cannot be relied upon to provide the suggestion to combine references. Al-Site Corp. v. VSI Int'l Inc., 174 F.3d 1308, 50 USPQ2d 1161 (Fed. Cir. 1999). (Emphasis added) See MPEP § 2143.01.

As outlined in Applicant's previous response of June 23, 2006, Applicant respectfully believes EP 0 640 649 (herein referred to as "Pellegatti, et al.") does not disclose, teach, or suggest, "A masterbatch composition comprising (percentage by weight):

- 1) 10-50% of a crystalline propylene homopolymer;
- 2) 50-90% of a blend consisting of:
 - a) a copolymer (a) of ethylene and 10-40% of at least one C₄-C₁₀ α -olefin of formula H₂C=CHR, where R is a C₂-C₈ linear or branched alkyl radical; and
 - b) an amorphous copolymer (b) of propylene and ethylene, wherein an ethylene content is from 20-70%, and having an intrinsic viscosity value of a xylene-soluble moiety of from 2.2 to 3.5 dL/g, this value being equal to 0.8 to 1.2 times the intrinsic viscosity value of a xylene-soluble moiety of copolymer (a);

wherein a weight ratio between copolymer (a) and copolymer (b) is from 3/1 to 1/3, and the masterbatch composition comprises a flexural modulus equal to or lower than 700 MPa," as currently recited by claim 14.

In particular, Applicant respectfully believes Pellegatti, et al. fails to teach, suggest, or disclose Applicant's currently claimed masterbatch composition comprising a flexural modulus equal to or lower than 700 MPa. As outlined on page 1, lines 16-19, in Applicant's specification,

The polyolefin composition prepared by using the masterbatch of the present invention can be injection molded into large objects which exhibit an improved balance of mechanical properties, in particular of flexural modulus and Izod impact strength even at low temperatures (e.g. at -30°C).

Accordingly, as stated in Applicant's specification, the currently claimed masterbatch composition is distinguishable over Pellegatti, et al. since the currently claimed masterbatch composition comprises, in part, an improved flexural modulus.

In fact, the compositions disclosed in Pellegatti, et al. have flexural modulus values from 1300 to 1600 [J/m], preferably from 1350 to 1600 [J/m], and more preferably from 1400 to 1600 [J/m]. See page 3, paragraph 0014.

The Examiner concedes this point on page 4, lines 3-4, of the currently pending Office Action, which states, "Pellegatti does not teach the flexural modulus limitation." As such, the Examiner has tried to remedy the deficiencies of Pellegatti, et al. by citing

Example 3 in U.S. Patent 6,048,942 (herein referred to as "Buehler, et al.") in an attempt to establish a *prima facie* case of obviousness.

However, Applicant traverses the Examiner's combination of Pellegatti, et al. and Buehler, et al.

In particular, Applicant respectfully traverses the Examiner's continued use of Pellegatti, et al. given Applicant's previously filed arguments. As previously outlined in Applicant's argument of June 23, 2006, Pellegatti, et al. discloses compositions comprising flexural modulus values from 1300 to 1600 [J/m], preferably from 1350 to 1600 [J/m], and more preferably from 1400 to 1600 [J/m].

Additionally, as previously outlined in Applicant's aforementioned arguments, Applicant believes the units disclosed in Pellegatti, et al. relating to the flexural modulus are suppose to read Mpa, and not J/m given, (i) the unit of J/m is commonly used for Izod impact values, which are disclosed directly before the flexural modulus values, and (ii) in a preferred embodiment on page 8, paragraph 0057, the flexural modulus is disclosed as being 1400 MPa. As such, Applicant believes the actual flexural modulus ranges disclosed in Pellegatti, et al. are clearly outside Applicant's currently claimed flexural modulus range.

Given Pellegatti, et al. discloses the polyolefin compositions therein comprise flexural modulus values clearly outside of Applicant's currently claimed range, Applicant respectfully traverses the Examiner's continued use of Pellegatti, et al. in the

current Office Action. A prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention. *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 220 USPQ 303 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984). See MPEP § 2141.02 VI. ". . . a reference will teach away when it suggests that the development flowing from its disclosures are unlikely to produce the objective of the applicant's invention." *Syntex (U.S.A.) LLC v. Apotex, Inc.*, 407 F.3d 1371 (Fed. Cir. 2005).

Accordingly, Applicant respectfully believes Pellegatti, et al. clearly teaches away from the currently claimed masterbatch composition given Pellegatti, et al. discloses polyolefin compositions comprising flexural modulus values clearly outside of Applicant's currently claimed flexural modulus values.

Notwithstanding, in addition to the arguments *supra*, Applicant respectfully believes even if Pellegatti, et al. is, albeit improperly, combined with Buehler, et al., the Examiner has not established a *prima facie* case of obviousness. To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. See MPEP

§ 2143.

The motivation to modify the prior art must flow from some teaching in the art that suggests the desirability or incentive to make the modification needed to arrive at the claimed invention. *Alza Corp. v. Mylan Laboratories Inc.*, 391 F.3d 1365, 1372-1373 (Fed. Cir. 2004). Obviousness cannot be established by combining the teaching of the prior art to produce the claimed invention, absent some teaching, suggestion or incentive supporting the combination. *In re Napier*, 55 F.3d 610, 613, 34 U.S.P.Q. 2d 1782, 1784 (Fed. Cir. 1995).

Moreover, the Federal Circuit has repeatedly warned that the requisite motivation must not come from Applicant's specification. See MPEP § 2142. There must be a reason or suggestion in the art for selecting the procedure used, other than the knowledge learned from the applicant's disclosure. *Cardiac Pacemakers, Inc. v. St. Jude Medical, Inc.*, 381 F.3d 1371 (Fed. Cir. 2004). Using an applicant's disclosure as a blueprint to reconstruct the claimed invention from isolated pieces of the prior art contravenes the statutory mandate of § 103 which requires judging obviousness at the point in time when the invention was made. *Grain Processing Corp. v. American Maize-Prods. Co.*, 840 F.2d 902, 907, 5 U.S.P.Q.2d 1788, 1792 (Fed. Cir. 1988). Beyond looking to the prior art to determine if it suggests doing what the inventor has done, one must also consider if the art provides the required expectation of succeeding in that endeavor. Additionally, Applicant's disclosure cannot be

relied upon for providing the basis for the suggestion and expectation of success. *In re Dow Chem. Co.*, 837 F.2d 469, 5 U.S.P.Q.2d 1529.

Accordingly, Applicant believes since Pellegatti, et al. clearly teaches away from the currently claimed masterbatch compositions, one would not be motivated, nor is there a suggestion otherwise, to modify Pellegatti, et al. to arrive at the currently claimed masterbatch compositions. As such, since there is no motivation or suggestion to modify Pellegatti, et al., Applicant respectfully believes the Examiner has not established a *prima facie* case of obviousness.

Yet even further, Buehler, et al. does not remedy the deficiencies of Pellegatti, et al. In particular, the Examiner has cited Example 3 in Buehler, et al. in an attempt to arrive at Applicant's currently claimed flexural modulus value. As for the basis for combining Buehler, et al. with Pellegatti, et al., the Examiner contends,

Buehler teaches in analogous art a thermoplastic olefin with a flexural modulus of less than 700 Mpa. See Buehler, Example 3.

However, Example 3 in Buehler, et al. is a thermoplastic polyolefin composition comprising 33.3% of Polymer A, which is defined as a crystalline propylene homopolymer, and 66.7% of Polymer E, which is defined as an olefin polymer composition containing 51% by weight of an ethylene/propylene copolymer having an ethylene

content of 50% and a solubility in xylene at room temperature of 43.0% in which the IV of the xylene soluble portion was 1.8, and 49% by weight of a propylene homopolymer matrix having a solubility in xylene at room temperature of 2.5%.

Applicant is currently claiming, "A masterbatch composition comprising (percentage by weight):

1) 10-50% of a crystalline propylene homopolymer;

2) 50-90% of a blend consisting of:

a) a copolymer (a) of ethylene and 10-40% of at least one C_4-C_{10} α -olefin of formula $H_2C=CHR$, where R is a C_2-C_8 linear or branched alkyl radical; and

b) an amorphous copolymer (b) of propylene and ethylene, wherein an ethylene content is from 20-70%, and having an intrinsic viscosity value of a xylene-soluble moiety of from 2.2 to 3.5 dL/g, this value being equal to 0.8 to 1.2 times the intrinsic viscosity value of a xylene-soluble moiety of copolymer (a);

wherein a weight ratio between copolymer (a) and copolymer (b) is from 3/1 to 1/3, and the masterbatch composition comprises a flexural modulus equal to or lower than 700 MPa."

Accordingly, Applicant respectfully traverses the Examiner's contention that Example 3 in Buehler, et al. is analogous to Applicants currently claimed masterbatch compositions. In particular, Applicant believes Example 3 fails to disclose, teach, or suggest Applicant's currently claimed composition comprising a

50-90% of blend consisting of, in part, a copolymer (a) of ethylene and 10-40% of at least one C₄-C₁₀ α-olefin of formula H₂C=CHR, where R is a C₂-C₈ linear or branched alkyl radical.

As such, Applicant respectfully traverses the combination of Buehler, et al. with Pellegatti, et al.

In light of the above, claims 14 - 26 are therefore believed to be patentable over Pellegatti, et al. in view of Buehler, et al. Accordingly, reconsideration and withdrawal of the rejection is respectfully requested.

CONCLUSION

Based upon the above remarks, the presently claimed subject matter is believed to be novel and patentably distinguishable over the prior art of record. The Examiner is therefore respectfully requested to reconsider and withdraw all rejections and allow all pending claims 14-26. Favorable action with an early allowance of the claims pending in this application is earnestly solicited.

The Examiner is welcomed to telephone the undersigned practitioner if he has any questions or comments.

Serial No. 10/506,950


Respectfully submitted,

By: 

Jarrod N. Raphael
Registration No. 55,566
Customer No. 34872

Date: March 16, 2007
Basell USA Inc.
912 Appleton Road
Elkton, MD 21921
Telephone No.: 410-996-1750
Fax No.: 410-996-1560

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Mail Stop Amendment, Commissioner for Patents, P. O. Box 1450, Alexandria, VA 22313-1450 on March 16, 2007.


Signature

March 16 2007
Date